

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Review of the Section 251 Unbundling)	
Obligations of Incumbent Local Exchange)	CC Docket No. 01-338
Carriers)	
)	
Implementation of the Local Competition)	
Provisions of the Telecommunications Act of)	CC Docket No. 96-98
1996)	
)	
Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced Telecommunications Capability)	

INITIAL COMMENTS OF
NuVOX INC.
KMC TELECOM, INC.
E.SPIRE COMMUNICATIONS, INC.
TDS METROCOM, INC.
METROMEDIA FIBER NETWORK SERVICES, INC.
AND SNiP LiNK, LLC

Brad E. Mutschelknaus
John J. Heitmann
Stephanie A. Joyce
Brett Heather Freedson
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, N.W.
Fifth Floor
Washington, D.C. 20036
(202) 955-9600 (voice)
(202) 955-9792 (facsimile)
jheitmann@kelleydrye.com

*Counsel for NuVox Inc., KMC Telecom, Inc.,
e.spire Communications, Inc., TDS Metrocom,
Inc., Metromedia Fiber Network Services, Inc.,
and SNiP LiNK, LLC*

April 5, 2002

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Summary

NuVox Inc. (NuVox”); KMC Telecom, Inc. (“KMC”); e.spire Communications, Inc. (“e.spire”); TDS Metrocom, Inc. (“TDS Metrocom”); Metromedia Fiber Network Services, Inc. (“MFN”); and SNiP LiNK, LLC (“SNiP LiNK”), (the “Fiber/Switch-Based CLEC Coalition”), in these Joint Comments, respectfully submit that there are no “changed circumstances” that have developed during the course of the past two years to justify dramatic changes in the Commission’s unbundling framework or in the unbundling rules currently in place.

Despite tremendous efforts and tremendous investments to match by each member of the Fiber/Switch-Based CLEC Coalition, each of these facilities-based carriers needs UNEs today. In these difficult times, access to capital is tenuous if not uncertain. To the extent capital can be devoted to facilities builds, those builds must be cost-justified by a sufficient and already secured revenue stream and customer base. For the facilities necessary to fill-out and extend the reach of their networks, there typically are few, if any, alternatives to those provided by the ILECs. Wholesale network element markets remain underdeveloped in the largest markets and are even more limited (to the extent that they exist at all) in second- and third-tier markets.

For these reasons, Fiber/Switch-Based CLEC Coalition members support the retention of all UNEs and the immediate removal of all UNE use restrictions. Loops and transport – in all capacities and types, lit and dark – remain the most essential of the UNEs needed by these facilities-based competitors. In the face of the ongoing capital crunch, access to EELs – now more than ever – is truly necessary. CLECs have little money to build and equip additional collocations and to do so in advance of securing an adequate customer base would be uneconomic (not to mention intolerable to Wall Street). As a result, EELs are needed to connect

end users to CLEC networks that do not – and should not – replicate the constellation of end offices built by the ILECs over the past hundred years.

For years, the ILECs have claimed that unbundling discourages investment in and deployment of advanced telecommunications capability. Five-years' experience with unbundling has proven this contention wrong. With both integrated T1 and DSL broadband service offerings, competitors have awoken the slumbering Bells and they have responded with heavy investment in advanced telecommunications capability. The Commission itself has found for three-years running that deployment of advanced telecommunications capability is progressing quite well.

Nevertheless, Congress rejected the Bells' premise in 1996 and the Commission wisely has followed suit several times since. Local competition and investment in/deployment of advanced telecommunications capability are complementary goals. The notion that Sections 251 and 706 of the Act contain competing goals that require balancing is unsupported rhetoric taken directly from the Bells' incessant campaign to lobby their way out of the bargain they struck in negotiations that preceded the 1996 Act. Congress already has determined that cost-based unbundling promotes competition and that competitive markets are more likely to deliver innovative and advanced services more rapidly and widely.

Until the Bells convince Congress otherwise, this Commission must stay the course and allow the further development of the robust wireline competition that the 1996 Act and its implementing rules were designed to facilitate. The best thing the Commission could do at this point to accelerate the transition to robustly competitive local markets would be to retain all UNEs, remove all UNE use restrictions, and engage in proactive, sure and certain enforcement.

With such a renewed commitment by the Commission, competitors will then stand a much better chance of attracting the capital necessary for making robust facilities-based competition a reality.

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I. INTRODUCTION

The Fiber/Switch-Based CLEC Coalition is a diverse group of companies that consciously have chosen to do business and battle with the monopolies of each of the Bells and several other incumbent local exchange carriers ("ILECs"). One Coalition member, has been

¹ Each coalition member has deployed its own fiber or switching equipment, or both.

competing since before the 1996 Act, and the others essentially are creations of the 1996 Act.

As a group, the Fiber/Switch-Based CLEC Coalition members have invested enormous amounts in facilities that currently are being used to bring choice, competition and broadband to “mass market” (including residential and small business), medium-sized business, and “enterprise” (large business) customers in tier-one, -two and -three markets across America.³

Some Coalition members have extensive fiber ring deployments, one is developing point-to-point intra-city networks in major markets, and others use a cost-justified, case-by-case fiber overlay approach. Five coalition members have deployed digital circuit switching equipment and four have deployed extensive packet switching capabilities. Two Coalition members have deployed national data networks and one is a tier one Internet backbone provider.

Two Coalition members are publicly traded companies, three are privately held and one is funded by an ILEC parent,. One Coalition member is seeking to emerge from bankruptcy, and all are seeking to attract additional investments and funding.

Every Coalition member needs cost-based access to ILEC unbundled network elements (“UNEs”) to implement their business plans.

Indeed, the Fiber/Switch-Based CLEC Coalition is a diverse group of facilities-based competitive local exchange carriers (“CLECs”) unified in support of retaining every UNE on the Commission’s current national unbundling list. The Coalition also is unified in support of (1) removing restrictions on access to UNE combinations, (2) the definition of the enhanced

² *Review of the Section 25 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 01-361 (rel. Dec. 20, 2001)(“*NPRM*”).

³ For example, TDS Metrocom has invested more than \$200 million and NuVox has invested roughly \$350 million in facilities.

extended link ("EEL") as a distinct UNE, and (3) adopting rules that ensure reasonable and nondiscriminatory access to dark fiber and all other UNEs.

A. The Face of Facilities-Based Competition Today

The CLECs that have joined in this Coalition represent a significant cross-section of facilities-based competitors. However, other facilities-based CLECs make use of the switching UNE and others chose to supplement their networks with ILEC special access instead of UNEs. Others use intermodal platforms to varying extents, although the dismantling of several wireless local loop competitors (WinStar and Teligent) and AT&T's abandonment of both wireless local loop and cable telephony platforms have been notable setbacks.

As a group, the companies that have joined to form this Coalition are among the most proficient self-provisioners in the CLEC industry. They have deployed fiber, digital circuit switches, packet switches, frame relay switches, ATM switches, soft switches, routers, collocations and significant back-office infrastructure. Their substantial deployment of advanced telecommunications capability is the result of massive investments in facilities and the hard work of hundreds of men and women designing and building networks, creating competitive and innovative products, developing more responsive and efficient customer care infrastructure, and marketing and selling the results of these efforts to consumers who never before had a choice in local service providers. In short, thousands of jobs and hundreds of thousands of customers depend on the wireline competition created, in part, by Coalition members.

Yet, despite tremendous efforts and tremendous investments to match, each member of the Fiber/Switch-Based CLEC Coalition needs UNEs today. Moreover, none can foresee the point when they will be able to compete on a fair and level playing field – nationally, regionally or in any specific market or segment thereof – without the unbundling mandated by Congress. In

these difficult times, access to capital is tenuous if not impossible. For Coalition members, there is little, if any, money to build facilities at this point in time. To extent capital can be devoted to facilities builds, those facilities that will be built must be cost-justified by a sufficient and already secured revenue stream and customer base. For the facilities necessary to fill-out and extend the reach of their networks, there generally are few, if any, alternatives to those provided by the ILECs. Wholesale network element markets remain underdeveloped in the largest markets and are virtually non-existent in second- and third-tier markets. Although deemed “competitive” in many areas, ILEC special access prices remain significantly above prices for corresponding UNEs and do not provide an economically viable substitute.

That is today’s market reality. As such, access to UNEs remains as critical as ever. In short, “the market” will not function properly without the mandatory cost-based unbundling envisioned and required by Congress. We encourage the Commission to familiarize itself with today’s market realities by taking a closer look at each member of the Fiber/Switch-Based CLEC Coalition. Without companies such as these, the development of robust and sustainable wireline local competition would suffer substantially. These are the companies deploying advanced telecommunications capability and deploying redundant networks. And they will continue to deploy, if and when regulatory and market conditions allow. A brief description of each Coalition member follows. More detailed profiles of each member are attached hereto at the tab labeled “**PROFILES**”. Members of the Fiber/Switch-Based CLEC Coalition also extend an invitation to the Commission and its staff to come to the field to have a first-hand look at the face of facilities-based competition today.

1. NuVox

NuVox is a rapidly growing, facilities-based integrated communications provider. NuVox emerged from the union of two regional CLECs, Gabriel and TriVergent. Using its own digital and packet switching equipment, and collocated transmission equipment in 205 collocations, NuVox serves 30 predominantly tier-two and tier-three markets in 13 states across the midwest and southeast.⁴ NuVox packages dedicated high-speed Internet access, web design and hosting, and "traditional" local and long distance telephone services with unified voice, e-mail, and fax messaging as well as advanced data services.⁵ NuVox also provides dial-up Internet services, data center services, and Customer Premise Equipment interconnects. NuVox provides its "broadband bundle" of services to most of its customers over an integrated T1.

2. KMC Telecom

KMC is a facilities-based integrated communications provider offering voice and broadband data services over nearly 3 million lines to more than 14,000 small/medium/large business and public/private institutional end users. KMC's lines and customers are predominantly in 35 tier-three markets in 17 states east of the Rocky Mountains.⁶ KMC also has deployed a national broadband data platform providing carrier customers with advanced local and Internet access in 140 markets throughout the United States. In its 37 core local markets, KMC uses digital circuit switching and advanced soft-switch equipment, as well as its high-speed, high-capacity SONET fiber ring networks and transmission equipment deployed in 140 ILEC end offices to provide a suite of services never before provided to customers in tier-three

⁴ Affidavit of Edward J. Cadieux, Vice President of Regulatory and Public Affairs, NuVox, ¶ 5 (Apr. 5, 2002) ("Cadieux Aff.") (see attached).

⁵ Cadieux Aff., ¶ 3.

markets. Although KMC invests millions of dollars in each of the primarily tier-three cities in which it competes, it relies upon leased ILEC transmission facilities to provide connectivity to most of its customer locations and between its own facilities and those of other carriers.

3. e.spire

e.spire began its existence in 1994 as American Communications Services, Inc. Transforming from a competitive access provider to a full-fledged CLEC with the advent of the 1996 Act, e.spire began deploying digital switching equipment, fiber rings and collocations in more than thirty local markets. e.spire's local markets include New York City, Philadelphia, Baltimore/Washington/Northern Virginia, Tampa and Dallas-Fort Worth in Verizon territory; Atlanta, Miami, New Orleans and more than a half dozen second and third tier markets in BellSouth territory; Dallas/Fort Worth, Kansas City and more than a dozen second and third tier markets in SBC territory; Phoenix and several second and third tier markets in Qwest territory; and Las Vegas in Sprint territory. e.spire also has one of the most extensive frame relay switching networks of any CLEC, is a tier one Internet backbone provider, and has a construction subsidiary that builds competitive networks for other CLECs. e.spire currently provides local voice, broadband data and Internet access, and long distance services to more than 4,000 small-to-medium-sized business customers. e.spire filed for Chapter 11 bankruptcy protection in March 2001 and currently is seeking exit financing.

4. TDS Metrocom

TDS Metrocom is a facilities-based CLEC providing local voice, long distance, and data services, including broadband data offerings such as DSL, to over 160,000 residential and

⁶ Affidavit of Michael P. Duke, Director of Governmental Affairs, KMC Telecom, Inc., ¶ 3 (Apr. 4, 2001) ("Duke Aff.") (see attached).

business customers in small to medium-sized markets in Illinois, Michigan and Wisconsin.⁷

Almost one-half of TDS Metrocom's customers are residential voice and broadband data customers and all are served through a mix of TDS facilities and UNEs; no customers are served via resale or UNE-P. TDS Metrocom uses its own switching equipment, collocated transmission facilities, limited fiber over-builds and UNE loops to deliver bundled voice and broadband service offerings to its end users. TDS Metrocom is a subsidiary of and is funded by TDS Telecom, which also owns 106 ILECs serving predominantly rural areas in 28 states.

5. MFN

MFN is a leader in the deployment of optical infrastructure used to provide advanced telecommunications services within key metropolitan areas in the United States and abroad. MFN is authorized to provide intrastate telecommunications in the District of Columbia and 43 states and offers a broad array of telecommunications services, including competitive access services, inter- and intra-city transport services, and transmission capacity to carrier and enterprise customers. Our major carrier customers use MFN transport as an alternative to ILEC transport services and UNEs. Where we have not deployed our own optical fiber directly to end user locations, we attempt to interconnect directly with the ILEC at the ILEC central office, via a fiber distribution frame, so that MFN may exercise its right to purchase unbundled dark fiber facilities from the ILEC. In effecting these arrangements, MFN has negotiated a variety of agreements with ILECs that establish innovative approaches to interconnection, collocation, and access to UNEs to support MFN's development and provision of competitive transport services.

⁷ Affidavit of Nicholas D. Jackson, Vice President – Business Operations, TDS Metrocom, Inc., ¶¶ 3, 5 (Apr. 4, 2002) ("Jackson Aff.") (see attached).

6. SNiP LiNK

SNiP LiNK is a facilities-based CLEC serving small businesses and institutional end users in suburban southern New Jersey and southeastern Pennsylvania.⁸ SNiP LiNK provides its customers with a full suite of bundled voice and broadband services using its own switching equipment and leased ILEC transmission facilities (UNEs and special access). Recently, SNiP LiNK commenced deployment of its first fiber ring. SNiP LiNK has been especially successful in bringing broadband Internet access services to school districts throughout the greater Philadelphia metropolitan area.

B. The Big Picture

For years, the ILECs have claimed that unbundling discourages investment in and deployment of advanced telecommunications capability. Congress rejected that premise in 1996 and the Commission wisely has followed suit several times since. Local competition and investment in/deployment of advanced telecommunications capability are complementary goals.⁹ The notion that Sections 251 and 706 of the Act contain competing goals that require balancing is unsupported rhetoric taken directly from the Bells' incessant campaign to lobby their way out of the bargain they struck in negotiations that preceded the 1996 Act. Congress already has determined that cost-based unbundling promotes competition and that competitive markets are more likely to deliver innovative and advanced services more rapidly and widely.

Until the Bells convince Congress otherwise, this Commission must stay the course and patiently allow the further development of the robust wireline competition that the 1996 Act and

⁸ Affidavit of Joseph Polito, Director, Telecommunications Products, SNiP LiNK, ¶ 3 (Apr. 4, 2002) ("Polito Aff.") (see attached).

⁹ How long would the Bells have left DSL technology sitting on the shelf, if they were not prodded by the CLECs – another ten or twenty years?

its implementing rules were designed to facilitate. The best thing the Commission could do at this point to accelerate the transition to robustly competitive local markets would be to retain all UNEs, remove all UNE restrictions, and engage in proactive, sure and certain enforcement. With such a renewed commitment by the Commission, competitors will then stand a much better chance of attracting the capital necessary for making robust facilities-based competition a reality.

1. Congress Provided for UNE-Based Competition

Congress' mandate in Section 251 is clear. Section 251 requires unbundling for any CLEC whose ability to offer a service would be impaired without cost-based, unbundled access to ILEC network elements. In short, Congress codified a policy decision based on the fundamental principle that unbundling is essential to the development of competition. Congress did so while also identifying the goal of bringing advanced services to all Americans. Thus, Congress established that competition and broadband deployment are complementary policy goals.

2. Unbundling Promotes Competition and Broadband Deployment

Congress' policy directives and the Commission's implementation of them to date already have borne fruit. CLECs have led the way in providing broadband to residential and small business customers. For example, TDS Metrocom was the first carrier to provide broadband DSL services to residential customers in its Wisconsin markets. Soon after, SBC-Ameritech followed suit. Similarly, CLEC Coalition members have led the way in bringing broadband T1 service bundles to small- and medium-sized businesses, particularly in second- and third-tier markets. Customers have embraced the innovative and more affordable broadband T1 service bundles offered by NuVox, e.spire, KMC and TDS Metrocom. ILECs have

responded by lowering their own T1 service prices and by promoting bundles that previously had taken a back seat to more expensive *a la carte* offerings.

3. Facilities-Based Carriers Need Cost-Based Access to UNEs

While each of the members of the Fiber/Switch-Based CLEC Coalition has made a substantial investment in its own facilities, ILEC UNEs remain an essential means of connecting their networks to end user customers. Without access to clean copper and high capacity loops and high capacity transport – sometimes in combination – some members of the Fiber/Switch-Based CLEC Coalition would simply be unable to serve their customers on a cost-effective basis while others would be unable to reach beyond the densest portions of the communities they serve. Even in the densest markets, Coalition members' reach would be severely constrained, as the cost of fiber over-builds of ILEC transport and loop plant is precipitously expensive and time consuming – and the capital needed for such overbuilds is scarce.

4. Unbundling Spurs the Development of Alternatives to ILEC UNEs

This rulemaking comes at a perilous time for the CLEC community. Wall Street has changed the rules.¹⁰ The days of “build it and they will come” are over. Today, investment money will be made available only to companies that can generate positive cash flow over existing facilities and network arrangements and demonstrate market penetration, stability and revenues to cost-justify future builds. This is true for competitive carriers that seek to serve end users as well as for carriers that seek to serve other carriers with alternatives to ILEC UNEs. For members of the Fiber/Switch-Based CLEC Coalition, the only practical and economical way of

¹⁰

For example, Vik Grover, managing director of equity research at Kaufman Bros. L.P. acknowledged in a recent public statement that the current financial crush that CLECs are experiencing is at least partially “Wall Street’s fault,” because Wall Street “changed the rules, and it really happened in mid-flight.” “CLECs Told Funding, Market Opportunities Remain, If Carriers Can Hang On,” TR Daily (Mar. 26, 2002).

developing a customer base and revenues sufficient to justify future builds is through the use of UNEs. Without access to UNEs, the development of competitive networks and non-ILEC wholesale alternatives will be arrested in major markets and may be altogether quashed elsewhere.¹¹

5. Sections 251 and 252 Cannot Be Guttled In Exchange for Empty or Implied Bell Promises

Despite the clear directive of Congress and the clear example set in the marketplace, the Commission again posits whether unbundling should be further restricted or eliminated in exchange for vague or even implied promises of deployment of advanced telecommunications capability by the Bells.¹² By now, the Commission should be highly skeptical of any promises made by the Bells. They don't keep them.¹³ Moreover, the Commission cannot fine the Bells enough to make them keep promises, even if it were so inclined.¹⁴ Nevertheless, the statute –

¹¹ This clearly would appeal to the Bells who realize that they are going to have to keep as much traffic on their networks as possible, in order to justify their own future builds. Thus, the Bells' real quarrel is not as much with unbundling per se, as it is with the cost-based pricing standard that is enshrined in the Act.

¹² The Bells are responding to competition and even to the threat of competition and there is no reason to believe that they will not continue doing so. Studies demonstrate that BOC spending increased by 22 percent in the period from 1997 to 2000 – after passage of the 1996 Act. See Federal Communications Commission, *Telecommunications @ the Millennium*, Figure 10 (Feb. 8, 2000) (BOCs invested \$82 billion from 1992 to 1995 and \$100 from 1997 to 2000). Without the threat of wireline competition from CLECs, however, the Bells' roll-out of broadband services is likely to slow considerably, as none of the intermodal platforms currently are capable of supporting fully substitutable services across all market segments. In fact, that slowing of investment is already occurring: Verizon's capital expenditure budget for 2002 is at least \$1.4 billion less than its 2001 budget, and SBC will spend \$2 billion less in 2002 than it spent in 2001. *Verizon Communications Reports Solid Results for Fourth Quarter, Provides Outlook for 2002*, Verizon News Release (Jan. 31, 2002); *SBC Reports Fourth-Quarter Earnings*, SBC News Release (Jan. 24, 2002)..

¹³ See discussion *infra* pp. 39-40.

¹⁴ SBC and Verizon made many promises in exchange for their mega-mergers and now appear to devote more resources to attempts to waive, modify, or eliminate those conditions than they do to fulfilling them. The Commission, to some extent, has been willing to go for the ride, even though it had imposed those conditions to protect competition and consumers. By now, SBC should have been nearly finished developing a facilities-based competitive presence in 30 markets outside its home service territory. Nevertheless, it now seems that SBC will not comply with that merger condition. For example, SBC opened offices in Atlanta, Seattle and Tampa, as required, then abruptly closed them only weeks later. *Familiar Ring: How Efforts to Open Local Phone Markets Helped the Baby Bells, An Aggressive SBC Thrives Under New Regulations; A Trend to Oligopolies, Slowing Rollout of Broadband*, Wall Street

... Continued

including Sections 251, 252 and 706 – neither contemplates nor permits the restriction of ILEC unbundling obligations based on the ill-conceived notion that doing so will accelerate broadband deployment.

**6. Congress Did Not Forsake Wireline Competition –
Neither Should the Commission**

The Commission’s recently amplified focus on “broadband” and “encouraging investment” cannot muddle the core statutory analysis governing the availability of UNEs. Sections 251 and 252 require cost-based access to non-proprietary UNEs, if a CLEC is impaired in providing the service it seeks to provide without such access. The statutory unbundling standard contains no provision for the consideration of ILEC threats to refrain from or promises to accelerate deployment of advanced telecommunications capability if unbundling is required. Moreover, as the Commission has found repeatedly, the Act’s unbundling requirements are technology neutral and do not apply merely to facilities that were in place on the date the 1996 Act became law or that are used exclusively to provide voice services.¹⁵

7. Section 251 and Section 706 Serve Complementary Statutory Goals

The Commission has addressed many of the questions asked in the NPRM in the *Local Competition First Report and Order*, the *Advanced Services First Report and Order*, and the

Journal at A14 (Feb. 11, 2002); *SBC Communications Shows Low Revenue Growth, Plans To Cut Several Thousand Jobs*, TR Daily (Oct. 22, 2001) (SBC CEO Whitacre: “No responsible company could justify fully deploying broadband capabilities and investing in new advanced networks in the face of this uncertain environment.”). What will the FCC do? Will it be fooled again?

¹⁵ For example, the Commission adopted the high-frequency portion of the loop (line sharing) as a UNE, which was an entirely new concept to competitive telecommunications. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Third Report and Order, FCC 99-355, 14 FCC Rcd. 20912, 20938-39, ¶¶ 54-55 (rel. Dec. 9, 1999) (“*Line Sharing Order*”), recon. *Third Report and Order on Reconsideration*, FCC 01-26 (Jan. 19, 2001); see also 47 C.F.R. § 51.319. In addition, the Commission has held that ILEC collocation obligations apply not only to COs extant in 1996, but also to new CO facilities that they construct or lease. *Local Competition First Report and Order*, 11 FCC Rcd. at 15797-98, ¶ 585.

UNE Remand Order.¹⁶ Notably, it rejected a similar Section 706-based Bell attack on the Section 251/252 unbundling provisions in its *Advanced Services First Report and Order*.¹⁷ Sections 706 and 251 did not serve competing goals then and they don't today. The Act has not changed. The goals of local competition and broadband deployment remain complementary and require no balancing. Moreover, the assertion that unbundling discourages deployment – by ILECs or CLECs, broadband or otherwise – simply defies common sense and the economic assumptions underpinning the 1996 Act (despite the Bells' ability to purchase studies that say otherwise). Nevertheless, no broadband deployment problem has been identified.¹⁸ Thus, the Commission again should reject the same Bell arguments that it regrettably now appears to be tempted to adopt.

8. Changed Circumstances Do Not Suggest that Less Unbundling Is Required

Since the Commission issued its *UNE Remand Order*, competition has progressed incrementally. The most dramatic change to develop over the past two years, however, has been

¹⁶ With respect to unbundling, the Supreme Court also has weighed in and will soon do so again. The U.S. Court of Appeals for the D.C. Circuit also is likely to issue opinions on relevant appeals during the pendency of this proceeding. Where the Commission is upheld by the Courts, it will have to carefully explain any change in its implementation of the Act, as the Act itself has not changed.

¹⁷ For example, the Commission concluded that, "in light of the statutory language, the framework of the 1996 Act, its legislative history, and Congress' policy objectives, the most logical statutory interpretation is that section 706 does not constitute an independent grant of authority. ... Under section 109(d), we may not use that authority to forbear from applying the requirements of section 251(c) and 271 prior to their full implementation." *Advanced Services MO&O*, 13 FCC Rcd. at 24047-48, ¶ 77.

¹⁸ See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, CC Docket 98-146, FCC 02-33 ¶ 1 (rel. Feb. 6, 2002) (the Commission concluded that advanced telecommunications is being deployed to all Americans in a reasonable and timely manner); see also *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Second Report, 15 FCC Rcd. 20913, 20914 (rel. Aug. 21, 2000); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, First Report, 14 FCC Rcd. 2398, 2402 (rel. Feb. 2, 1999).

the drying-up of the capital markets to facilities-based competitors. The difficulty of attracting capital has forced bankruptcies and liquidations, and has severely curbed capital expenditure budgets needed to expand the reach of CLECs' networks. Bankruptcies, decreased stock prices, debt restructuring and market retrenchment announcements reveal that the state of competition – and the development of non-ILEC UNE alternatives – is not as robust as the FCC may think it is. Marketplace developments during the past two years do not suggest that CLECs are any less impaired without access to any of the defined UNEs than they were two years ago. Indeed, CLECs' difficulty in gaining, if not inability to gain, access to capital suggests a much heightened level of impairment vis-à-vis two years ago.

9. Unchanged Circumstances Also Do Not Suggest that Less Unbundling Is Required

The Commission would do well to consider what has not changed much since its *UNE Remand Order*. Perhaps the most significant market factor that has remained largely unchanged since 1999 is the Bells' determination to distinguish UNEs from their lucrative special access services by making the use of UNEs a difficult and risky proposition.¹⁹ Although progress is being made, provisioning and hot cuts remain perilous endeavors and customers continue to blame CLECs for resulting failures.²⁰

ILECs also continue to create other barriers to CLECs' use of UNEs as a method of market entry. For example, Verizon has developed a systematic program for denying UNE

¹⁹ Because the Bells have made the use of UNEs unpredictable and unreliable, some CLECs have refused to use them. CLEC reliance on special access demonstrates the Bells' success in driving-up their rivals' costs (which ultimately comes at the expense of investors and consumers).

²⁰ For example, as AT&T explained to the Commission, "[t]he manual nature of the 'hot cut' processes required to access the incumbent's loop infrastructure has resulted in unacceptably poor service quality during the provisioning process, including significant services outages, which cause higher costs, gated volumes, and customer dissatisfaction." Letter from Robert W. Quinn, Jr., Vice President of Federal

... Continued

access through unilaterally and unlawfully imposed restrictions. “No facilities” is Verizon-speak for a refusal to modify existing network elements to meet CLECs’ requests. To avoid providing interoffice dedicated transport UNEs, Verizon requires that the circuits run only between collocations in its own central offices. BellSouth simply won’t convert special access to UNEs – unless the conversion involves a combination – without extracting a ransom. BellSouth also denies CLECs the ability to fully use UNEs for interconnection, as it insists on “ratcheting” interconnection trunk pricing based on the “jurisdiction” of the traffic flowing over the trunks. SBC refuses to allow carriers a means of accessing dark fiber.

10. Efficient Effective and Reliable Unbundling Rule Enforcement Would Spur Competition, the Development of Non-ILEC UNE Alternatives and Broadband Deployment

When it comes to enforcement, the Commission recently has talked a big game,²¹ but has delivered less than advertised and less than it should.²² Although the Commission has asked for

Government Affairs, AT&T, to Dorothy Attwood, Chief, Common Carrier Bureau, at 2 (Mar. 30, 2001) (attached to AT&T notice of *ex parte* communication, CC Docket No. 9698 (Apr. 2, 2001)).

²¹ E.g., *Powell CompTel Address*, at *3 (stating his plans to provide “swifter and tougher enforcement”); see also Remarks of Chairman Michael K. Powell at the Association for Local Telecommunications Services (Nov. 30, 2001) (“*Powell ALTS Address*”) (“We heard the call and have made enforcement a cornerstone of our competition policy.”).

²² As regards SBC, for example, the Commission levied a mere \$94,500 fine – later reduced to \$84,000 – for 24 separate violations of the collocation space reporting rules. SBC Communications, Inc. Apparent Liability for Forfeiture, File No. EB-00-IH-0326a, Order of Forfeiture, 16 FCC Rcd. 10963 (2001), amended, Order on Review, FCC 02-61 (rel. Feb. 25, 2002). The Commission was, however, expressly authorized by the SBC-Ameritech merger conditions to charge the full statutory fine of \$100,000 per violation as provided in Section 503 of the Communications Act, 47 U.S.C. § 503(b)(2)(B). As to Verizon, in response to a letter filed by Focal Communications Corporation which revealed Verizon’s repeated bad faith efforts to preclude CLECs from adopting the complete terms and conditions of existing interconnection agreements, in blatant violation of the most-favored nation provisions of the *Bell Atlantic-GTE Merger Order*, *Matter of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032 (rel. Jun. 16, 2000), the Commission’s Common Carrier Bureau merely issued a letter setting forth its own interpretation of the provisions at issue. See Letter from Carol E. Matthey, Deputy Chief, Common Carrier Bureau, FCC, to Michael L. Shor, Swidler Berlin Shereff Friedman, LLP, Counsel to Focal Communications Corporation (Dec. 27, 2000).

additional enforcement powers,²³ it fails to make full use of the enforcement tools it already has.²⁴ Although the Commission established on paper a regime whereby CLECs seeking conversion of special access circuits to EELs self-certify and ILECs convert first and dispute later, the Commission has tolerated and even condoned pre-conversion audits by the Bells.²⁵ Although the Commission promised that EEL conversion disputes and waiver applications would be addressed quickly, it has let them languish.²⁶ Although the Commission has established an accelerated docket, it accepts hardly any cases.²⁷ Although the Commission appears to spend a fair amount of time meting out sub-maximum fines for violations of merger

²³ Powell ALTS Address at *4 (“[W]e called on Congress to dramatically increase the forfeiture amount allowed under the statute.”).

²⁴ For example, in *Matter of SBC Communications, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, File No. EB-00-IH-0432, 15 FCC Rcd. 14720 (2000) (“*SBC Notice of Apparent Liability*”), the Commission fined SBC a mere \$88,000 for failure to report certain performance data in accordance with the published Business Rules adopted in the Carrier-to-Carrier Performance Plan that SBC agreed to undertake as part of the merger conditions adopted in the *Applications of Ameritech Corp., Transferor, and SBC Communications, Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission’s Rules*, Memorandum Opinion and Order, 14 FCC Rcd. 14712 (1999) (“*SBC-Ameritech Merger Order*”). In that proceeding, the Commission found that SBC willfully and repeatedly failed to accurately report its monthly performance data in thirteen states, for thirteen of the twenty reporting categories specified in the *SBC-Ameritech Merger Order*, over a period of thirteen months. Although, at that time, Section 503(b)(2)(B) of the Act authorized the Commission to assess a forfeiture of up to \$110,000 for each violation, or each day of a continuing violation, up to a statutory maximum of \$1,100,000, the Commission’s lenient treatment of SBC’s misconduct resulted in a forfeiture amount of only \$8000 for each of 11 violations of the *SBC/Ameritech Merger Order*, totaling \$88,000. *SBC Notice of Apparent Liability*, 15 FCC Rcd. at 14722-23, ¶¶ 13-15.

²⁵ See *In the Matter of Net2000 Communications, Inc., v. Verizon-Washington, D.C., Inc., Verizon Maryland, Inc., and Verizon-Virginia, Inc.*, File No. EB-00-018.

²⁶ See, e.g., *In the Matter of Net2000 Communications, Inc. v. Verizon-Washington, D.C., Inc., Verizon Maryland, Inc., and Verizon-Virginia, Inc.*, File No. EB-00-018. By its Complaint of November 6, 2000, Net2000 Communications, Inc. (“Net2000”) alleged that Verizon denied its request for the conversion of certain special access circuits to enhanced extended links (“EELs”). The Commission did not release a final Memorandum Opinion and Order in this proceeding until January 9, 2002, more than a year after the complaint was filed and nearly two months after Net2000 filed for bankruptcy. Similarly, the Commission has long ignored several formal petitions filed by competitive carriers requesting waiver of its rules which would enable such carriers to expeditiously convert exclusively local circuits, leased under the ILECs’ special access tariffs, to EELs. For example, petitions filed WorldCom and ITC/Deltacom, dated September 12, 2000 and August 16, 2001, respectively, have not been reviewed, or even docketed, by the Commission to date.

²⁷ See *id.*